APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-7370

HORACIO RAMOS MIRANDA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition for Review from an Order of the Board of Immigration Appeals

Argued and Submitted June 5, 1980

[Decided April 8, 1982]

Before: PREGERSON and NELSON, Circuit Judges, and WILKINS,* District Judge.

PER CURIAM:

This case is before us on remand from the Supreme Court. *INS* v. *Miranda*, ___ U.S. ___, 102 S.Ct. 81, 70 L.Ed.2d 77 (1981). The Court vacated our earlier opinion, *Miranda* v. *INS*, 638 F.2d 83 (9th Cir. 1980), and remanded for further consideration in light of *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981).

Miranda petitions for review of the dismissal by the Board of Immigration Appeals (BIA) of his appeal of a deportation order and denial of his application for adjustment of status or for voluntary departure. Miranda argues that the Immigration and Naturalization Service (INS) should be estopped from denying him permanent

* Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

resident status because of its eighteen-month delay in processing an immediate-relative visa petition filed by Miranda's then wife on his behalf. The BIA found no evidence of "affirmative misconduct" by the INS. In our original opinion, we reversed that finding and applied estoppel against the INS. Having reconsidered the matter of light of *Schweiker* v. *Hansen*, *supra*, we now adhere to that conclusion.

The *Hansen* decision was one in which the Supreme Court refused to apply estoppel against the government. In summarily reversing a decision of the Second Circuit, the Court, without prescribing any general rule, held that estoppel was not justified on the facts of the case.[1] The Court noted that in *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 385, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947), it had stated that the courts have a duty to "observe the conditions defined by Congress for charging the public treasury," and that a line of lower court decisions had acknowledged that duty by "refusing to estop the government where an eligible applicant had lost Social Security benefits because of possibly erroneous replies to oral inquiries." 450 U.S. at 788, 101 S.Ct. at 1470. *Hansen*, the Court said, fit into that line of decisions. *Id.*

In the instant case, by contrast, petitioner is not seeking benefit payments out of the public fisc. He is asking to be allowed to become a permanent resident, which entails no direct burden on public funds. Moreover, the *Hansen*

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[1] *Hansen* involved a claimant who had received misinformation from a Social Security Administration field representative and had consequently failed to apply for benefits for which she was otherwise eligible. The Second Circuit held that the misinformation, conjoined with the field representative's violation of internal agency regulations, estopped the government from denying the claimant benefits for the period during which she was otherwise eligible. The Supreme Court reversed this holding.

Court noted that there had been no finding of "affirmative misconduct" by government agents. 450 U.S. at 788-89, 101 S.Ct. at 1470-71. Here, on the other hand, our original opinion rested precisely on such a finding, 638 F.2d at 84, which we reiterate here: the unexplained failure of the INS to act on the visa petition for an eighteen-month period (after which Miranda's marriage broke up and the former Mrs. Miranda withdrew her visa petition) constitutes affirmative miconduct by the INS. *See Sun Il Yoo v. INS*, 534 F.2d 1325 (9th Cir. 1976) (INS's unjustified one-year delay in processing visa preference application estopped INS from denying benefit of labor pre-certification).

Finally, the *Hansen* Court observed that the official misconduct there had not caused respondent to act or fail to act in a manner "that [she] could not correct at any time." 450 U.S. at 789, 101 S.Ct. at 1471. In the instant case, however, the INS misconduct *did* inflict irrevocable damage on petitioner.

Given these significant distinctions between *Hansen* and the present case, we respectfully conclude that the Supreme Court's conclusion that the government was not estopped in *Hansen* neither compels nor suggests the same conclusion here. Accordingly, this matter will be remanded for consideration of Miranda's application for permanent resident status under the same circumstances that would have existed had the INS acted within a reasonable time after receiving the visa petition.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-7370

HORACIO RAMOS MIRANDA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition for Review from Order of the Board of Immigration Appeals

Argued and Submitted June 5, 1980

[Filed Oct. 30, 1980]

OPINION

Before: PREGERSON and NELSON, Circuit Judges, and WILKINS,* District Judge.

PHILIP C. WILKINS, District Judge

Miranda seeks judicial review of a Board of Immigration Appeals (BIA) decision. Said decision dismissed the appeal of the order of deportation and of the denial of petitioner's application for adjustment of status or for voluntary departure. Petitioner argues that the Immigration and Naturalization Service (INS) should be estopped from denying him the status of permanent resident pursuant to the pro-

* Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

visions of Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, due to its delay in processing an immediate relative visa petition filed by his then wife on his behalf. The Board found no evidence of any "affirmative misconduct" by a Service officer regarding the denial of the visa petition. We reverse.

The unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petition's withdrawal following the breakup of Miranda's marriage was affirmative misconduct by the INS. *See Villena* v. *INS*, No. 78-2954, slip opinion 3605, —— F.2d —— (9th Cir. 1980) (en banc); *Sun Il Yoo* v. *INS*, 534 F.2d 1325 (9th Cir. 1976).

The matter will be remanded for consideration of Miranda's application for permanent residence under the circumstances as they existed at the time the INS should originally have acted. The INS must, however, in considering the application, treat the visa petition as if it were approved.

Reversed and remanded.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-7370

HORACIO RAMOS MIRANDA, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed Mar. 24, 1981]

ORDER

Before: PREGERSON and NELSON, Circuit Judges, and WILKINS,* District Judge

The panel has voted to deny the petition for rehearing. Judges Pregerson and Nelson have voted to reject the suggestion for rehearing en banc, and Judge Wilkins recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Jul. 17, 1979

File: A22 380 487—Los Angeles

In re: HORACIO RAMOS MIRANDA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jack T. Price, Esq.
448 South Hill Street
Suite 718
Los Angeles, Calif. 90013

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant remained longer than permitted

APPLICATION: Adjustment of status, voluntary departure

The respondent appeals from an April 6, 1978, decision of an immigration judge finding him deportable as charged, denying his applications for adjustment of status and voluntary departure, and ordering his deportation to the Philippines. The appeal will be dismissed.

The respondent is a 47-year-old native and citizen of the Philippines, who entered the United States as a visitor for pleasure in July 1971. He married

a United States citizen in May 1976 and she filed a visa petition on his behalf in June 1976. In December 1977, however, the respondent's wife informed the Service that she was withdrawing the visa petition.[1] That same month, the District Director denied the respondent's application for status as a permanent resident based on a finding that he had failed to establish that an immigration visa was immediately available.

An Order to Show Cause had been issued on December 7, 1977, charging the respondent with being deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an "overstayed" visitor. At hearings held in March 1978, the respondent conceded deportability, but applied for adjustment of status under section 245 of the Act, 8 U.S.C. 1255. Alternatively, he requested voluntary departure under the provisions of section 244(e), 8 U.S.C. 1254(e).

The immigration judge denied the application for adjustment of status based on respondent's failure to establish eligibility for an immigrant visa. See Section 245(a)(2) and (3). As regards the application for voluntary departure, the respondent admitted that he had been convicted in a California state court in 1976 for a misdemeanor offense involving the possession of a "blue box" (a device used to defraud the telephone company of its services). It was subsequently determined that the respondent had been convicted on his plea of guilty in June 1977, placed on "summary" probation for a period of one year, and ordered to make restitution to the telephone company in the amount of some $3,500. On March 31,

[1] The respondent's wife filed a petition for divorce in a California Superior Court on December 20, 1977.

1978, the State court terminated probation and vacated the conviction under the provisions of section 1203.4 of the California Penal Code following proof that restitution had been made.

The immigration judge determined that the expungement of the respondent's record of conviction under section 1203.4 of the California Penal Code removed any bar to his establishing good moral character under the provisions of section 101(f) of the Act, 8 U.S.C. 1101(f). *See Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 1967) (effect of expungement of non-drug offense under section 1203.4 of the California Penal Code); *Matter of G-*, 9 I&N Dec. 159 (BIA 1959; A.G. 1960); *Matter of H*, 6 I&N Dec. 619 (BIA 1955). *But see, Ocon-Perez* v. *INS*, 550 F.2d 1153 (9 Cir. 1977); *Burr* v. *INS*, 350 F.2d 87 (9 Cir. 1965), *cert. denied* 383 U.S. 915 (1966). The immigration judge concluded, however, that the conduct underlying the vacated conviction could be considered in determining whether favorable discretionary consideration of the application for voluntary departure was warranted. *See Matter of Gonzalez*, Interim Decision 2564 (BIA 1977); *Matter of H-*, *supra*. In view of the recency of the respondent's conviction and his absence of familial ties to the United States, the immigration judge concluded that voluntary departure should be denied in the exercise of discretion.

On appeal, the respondent, through counsel, submits that the Service should be "equitably" estopped from denying the adjustment of status application because the Service had sufficient time during the 18 months between the filing of the visa petition and its withdrawal by the respondent's wife to have acted on both the petition and the application for permanent resi-

dence. However, under the facts of this case (where the denial of the visa petition resulted from its withdrawal by the respondent's wife followed by her filing a petition for divorce in a California Superior Court) we do not find a basis for any "equitable" estoppel even assuming Board jurisdiction to grant such relief. Moreover, we find no evidence of any "affirmative misconduct" by a Service officer regarding the denial of the visa petition. See *INS* v. *Hibi*, 414 U.S. 5 (1973); *Santiago* v. *INS*, 526 F.2d 488 (9 Cir. 1975), *cert. denied* 425 U.S. 971 (1976). *But see Sun Il Yoo* v. *INS*, 534 F.2d 1325 (9 Cir. 1976). Accordingly, we find the respondent's application for adjustment of status under section 245 was properly denied based on his statutory ineligibility for such relief.

As regards the denial of voluntary departure, we find that the immigration judge properly concluded that the respondent was not statutorily precluded from establishing his good moral character under the provisions of section 101(f) of the Act by virtue of his conviction for possession of a "blue box." Wholly aside from the fact that the non-drug offense was expunged under section 1203.4 of the California Penal Code (*See Matter of Ibarra-Obando*, *supra*), that single conviction qualified as a petty offense within the meaning of section 212(a)(9) of the Act and, thus, was not within scope of section 101(f). *See Matter of Urpi-Sancho*, 13 I&N Dec. 641 (BIA 1970). The misconduct underlying that conviction, however, was properly considered by the immigration judge in determining whether the respondent was deserving of a discretionary grant of voluntary departure. *See Matter of Turcott*, 12 I&N Dec. 206 (BIA 1967).

In view of the recency and extent of this misconduct (as evidenced by the amount of restitution required),

we consider it to be an adverse factor relevant to the exercise of discretion even in view of the respondent's restitution of some $3,500 to the telephone company and the subsequent expungement of the conviction. We find no countervailing equitable considerations alleged by respondent sufficient to warrant a favorable exercise of discretion. In fact, other than contesting the weight to be attached to the misconduct surrounding the "blue box" offense, no countervailing equities are alleged by the respondent. Therefore, we find no error with the immigration judge's determination that voluntary departure was appropriately denied in the exercise of discretion.

The appeal will accordingly be dismissed.

ORDER: The appeal is dismissed.

/s/ David L. Milhollan
Chairman

APPENDIX E

UNITED STATES IMMIGRATION COURT
UNITED STATES DEPARTMENT OF JUSTICE
Los Angeles, California

File No. A22 380 487 April 6, 1978

IN THE MATTER OF
HORACIO RAMOS MIRANDA, RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act, Section 241(a)(2); nonimmigrant remained longer than permitted

APPLICATION: Adjustment of status under Section 245; in the alternative, voluntary departure in lieu of deportation

ON BEHALF OF RESPONDENT:

Jack T. Price, Esq.
448 South Hill Street
Suite 716
Los Angeles, California

ON BEHALF OF SERVICE:

William Odencrantz, Esq.
Trial Attorney
Los Angeles,
California

DECISION OF THE IMMIGRATION JUDGE

In pleading to the Order to Show Cause, the respondent admitted that he entered the United States as a visitor for pleasure on July 23, 1971, and that he has

remained in this country without authority since December 1, 1971. He conceded and I am satisfied that he is deportable on the charge set out in the Order to Show Cause.

Respondent has filed an application for adjustment of status under Section 245 claiming that he is eligible for such relief on the basis of his marriage to a United States citizen, Linda Milligan. A visa petition, although filed by Linda Milligan, was withdrawn by her on December 5, 1977, prior to adjudication by the District Director, *Exhibit No. 2.* As the respondent is not the beneficiary of a valid unexpired visa petition, he is not eligible for the benefits of Section 245, 8 C.F.R. 245.1(d). His application is denied.

Respondent has applied for the privilege of voluntary departure. The respondent was convicted upon his plea of guilty in the Municipal Court, North Orange County, California, on June 23, 1977 for violation of Section 502.7(b)(1) of the California Penal Code. The offense is commonly called, "Blue Box" crime. It penalizes those who obtain telephone or telegraph services "with intent to defraud." The crime involves moral turpitude since a necessary element to convict is the intent to defraud. *Matter of Kinney*, 10 I & N Dec. 548.

Upon making full restitution of $3,547.72 to the telephone company, the respondent was permitted to withdraw his plea of guilty and the crime was expunged under Section 1203.4 of the California Penal Code.

The expungement of the record of conviction under California law removes the bar to establishing good moral character. *Matter of H.*, 7 I & N Dec. 249. The conviction and the nature of the criminal activity

which resulted in that conviction will be considered in determining whether the application for voluntary departure merits favorable consideration. *Matter of H.*, 6 I & N Dec. 619, *Matter of Gonzalez*, Int. Dec. 2564.

Although the respondent may be eligible for the discretionary relief of voluntary departure, this does not mean that he must be granted that relief. Discretion must be based upon the balancing of factors, both favorable and unfavorable. There is no indication that the respondent has close family ties in the United States. His marriage to a United States citizen is at an end. The recency of his conviction for a crime involving moral turpitude is a sufficient adverse factor without counterbalancing favorable factors for me to deny his application as a matter of administrative discretion.

ORDER:

IT IS ORDERED that the respondent's application for adjustment of status under Section 245 of the Act be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to the Philippines on the charge set forth in the Order to Show Cause.

/s/ Jay Segal
JAY SEGAL
Immigration Judge

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